Supreme Court, U.S.
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No. 91-549

In The

Supreme Court of the United States

October Term, 1990

MARY W. McELWAIN,

Petitioner,

v.

COUNTY OF FLATHEAD,

Respondent.

Petition For Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THOMAS J. MURPHY
CONKLIN, NYBO, LEVEQUE & MURPHY, P.C.
#9 3rd Street North, Suite 203
P. O. Box 2049
Great Falls, MT 59403-2049
(406) 727-9270
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does a County take property in violation of the property clause of the United States Constitution, applicable to the states through the Fourteenth Amendment, when it enacts septic system regulations which allow the landowner to construct her home, but require the landowner's septic drain field to be one hundred feet away from the 100-year floodplain?

2. Does the finding of the District Court and the Montana Supreme Court that the septic regulations "as adopted will meet those public health standards and are reasonably designed to do so" equate with or exceed the tests adopted by this Court in its previous taking decisions?

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STATEMENT OF THE CASE

In an effort to prevent the flow of untreated sewage into the Flathead River, Flathead County enacted sanitation regulations requiring the petitioner, McElwain, to separate by 100 feet her sewage drain field from the 100-year floodplain.

The petitioner purchased property in Flathead County in 1979, and held the property as an investment. Two years after Flathead County adopted floodplain regulations and maps relevant to the petitioner's property, she applied on November 6, 1986, for a below-ground septic system permit. Her application was denied on November 7, 1986, on the grounds that, "Flathead County Regulations for Sewage Treatment Systems, Section 8.2D, requires a 100-foot setback between the septic system drain field and the 100-year floodplain."

The petitioner requested a variance, but her request was denied. However, the petitioner did not raise an issue in the District Court regarding the appropriateness of the denial of her variance request. (Petitioner's Appendix (Pet. App.) B.1 at 3, p. 50.) In fact, testimony at trial revealed that petitioner's civil engineer had improperly submitted the septic system application. It was held that if the petitioner's civil engineer had not made this mistake, her application would have been accepted, and she would have been allowed to build her home without need of a variance. (Pet. App. B.1 at 12, p. 43.) Therefore, petitioner McElwain proceeds here with a facial challenge of Flathead County's floodplain regulation.

The petitioner contends that Flathead County did not substantiate the need for the 100-foot setback rule. (Petition pp. 9-10.) In actuality, every expert who testified, including the petitioner's experts, attested to the cleansing propensities of the soil barrier created by the setback regulation. Petitioner's civil engineer admitted that a 100-foot soil barrier provided four valuable treatment functions: Absorption, filtration, microbial degradation, and dilution (Transcript, pp. 119-121). Therefore, the petitioner is incorrect in contending that "the County presented no factual basis to support the need for its setback regulations." (Petition, p. 9.) In truth, the petitioner could not and did not dispute the scientific evidence and testimony presented which establish the floodplain setback regulations substantially advance the County's legitimate interest of protecting its citizens from untreated sewage.

The petitioner's hydrologist, Mr. Spratt, also enumerated the same four treatment functions of soil (Transcript, pp. 261-262). Mr. Spratt conceded that the treatment function occurs while sewage effluent moves horizontally through a 100-foot soil barrier created by the setback regulations (Transcript, p. 262, line 20). Mr. Spratt acknowledged the many studies discussed at trial which document the horizontal underground travel of viruses from septic systems (Transcript, p. 264, line 19). Mr. Spratt recognized that setback requirements are not standardized because of different soils and hydrologic conditions (Transcript, pp. 241-242). This, he admitted, invites the county's legislative body to tailor a horizontal setback regulation suitable for the conditions in Flathead County (Transcript, p. 247, line 7).

Flathead County called, by deposition, Dan Frazier from the Montana Department of Health and Environmental Sciences, to describe the purpose of the 100-foot setback regulation:

> . . . to protect public health and the quality of state waters . . . Sewage can obviously have a lot of contaminants in it. Many of those are organic contaminants, pathogens which can cause water-borne disease when they enter the groundwater or surface waters that are used by people as sources of drinking water. . . . Nutrients like nitrogen and phosphorous are found in sewage. Those can have an impact on groundwater quality when they reach surface waters. They can, if they are the limiting factors, cause algae blooms in streams and lakes.

(Frazier testimony, by deposition, p. 9, line 3.)

Mr. Frazier also discussed another important reason for the 100-foot setback rule: "Floods can be expected to have fairly long duration; and in those cases, that floodplain is going to be inundated in water for an extended period of time." (Frazier deposition, p. 10, line 11.) During a flood, a submerged sewage drain field does not treat effluent. A submerged drain field allows effluent to be freely introduced to the flood waters.

Mr. Frazier cited several scientific studies determining the horizontal underground movement of contaminants found in sewage effluent. These studies helped the State of Montana and Flathead County to decide where, in relationship to the floodplain, to set back sewage drain fields. Mr. Frazier related four instances studied by the University of Wisconsin wherein sewage drain fields

were spiked with virus particles. These particles were then monitored in nearby wells. Some virus particles traveled as far as 150 feet from the disposal site (Frazier depo., p. 11, line 21). These studies indicated to Flathead County and the State of Montana that regulations are needed to horizontally separate the dumping point of sewage effluent from other water sources such as rivers and floodwaters.

Flathead County also called its environmental health specialist, Drew Paslawsky. Mr. Paslawsky confirmed that the purpose behind the 100-foot setback rule is to minimize water pollution. Mr. Paslawsky testified that if septic drain fields are flooded, sewage effluent may flow to the ground surface or back into the structure (Transcript, p. 279, line 13).

Mr. Paslawsky explained why Flathead County needed a horizontal setback requirement:

> During the 100-year flood on the McElwain property, if we have a conventional drain field installed there, the flood-waters and associated ground water table will inundate the bottom of the drain field and essentially you lose all of that benefit of that vertical, unsaturated treatment. You then are left with the only treatment being horizontal treatment through the soil, where organisms will die off due to the hostile environment, filtration, and dilution. That is the only setback we have that will provide any benefit to protect the floodwaters, to keep the sewage out of them. And likewise, to prevent the system from backing up into the house.
>
> And therefore, when you look at studies done on the movement of micro-organisms through

> groundwater aquifers, in most of the studies, on a majority of the soils in the study, have found that the micro-organisms are removed after about 100, 150 feet of travel through the aquifers. So it is a fair and just setback rule, that 100-foot rule. It encompasses most of the situations we are dealing with.

(Transcript, pp. 340-341.)

The District Court made three specific findings directly relevant to the issue of this appeal:

> [R]eduction of pathogens and organics would not occur during a flood if the ground was saturated. Therefore, the sub-surface sewage system must be outside of the flood plain to insure effective sewage treatment. (Pet. App. B.1. at 13, p. 44.)

> The purpose of these setback regulations is to protect the health, welfare, and safety of the public by requiring a reasonable distance between sewage drain field and flood plain to allow the soil to cleanse sewage effluent. Setback regulations insure the cleansing of sewage effluent in four ways: Microbial degredation (hostile environment), filtration, dilution, and absorption. It is generally true that the larger the soil separation (setback), the better the treatment of sewage effluent accomplished by the soil. These functions occur most effectively during the vertical flow-treatment of effluent; however, three of the treatment functions continue during the horizontal movement of sewage effluent (after the effluent reaches groundwater). These three treatment functions accomplished by horizontal treatment include: Decomposition (hostile environment), filtration,

> and dilution. The horizontal treatment of effluent by soil is therefore an important part of the overall treatment of sewage effluent. This cleansing by the soil must occur or the public will be endangered by such contaminants. (Pet. App. B.1. at 14, pp. 44-45.)
>
> . . . The Court further finds in light of the testimony offered that although there is a divergence of opinion as to the specific setback requirements necessary to meet public health standards that there can be no question that the regulations as adopted will meet those public health standards and are reasonably designed to do so. (Pet. App. B.1. at 19, pp. 47-48.)

The District Court's finding that sewage drain fields must be outside of the floodplain to insure adequate effluent treatment led it to conclude the setback regulation as adopted "will meet" the health objectives of Flathead County. The District Court therefore upheld the regulation as a valid exercise of the County's police power without need of compensation. After McElwain submitted a petition for rehearing, the District Court further extrapolated:

> [I]t is clear that the activity prohibited, i.e., septic system within, or within 100 feet of, the 100-year flood plain is an activity which, if allowed, would be injurious to the health or safety of the community. A perhaps extreme example of similar type of activity which the State has a legitimate interest in proscribing would be use of land for a hazardous waste dump, particularly where the populous would be somehow exposed to the contents of such a dump. While the contents of a septic system may not equate that of a hazardous waste dump there can be no

> question that if the contents enter a public waterway such as the Flathead River, in this instance, that there would be a clear and present danger to those using that waterway.

(Pet. App. B.2. at pp. 55-56.)

McElwain appealed to the Montana Supreme Court arguing that the District Court did not specifically find the setback regulation "substantially advanced" a legitimate state interest. Citing its previous taking decisions, the Montana Supreme Court affirmed the District Court and held that its usage of the term "reasonable" is a "standard of equivalent merit and significance to the federal standard of 'substantial'." (Pet. App. 1, p. 22.)

The Court said:

> A review of the record shows the evidence supports a finding that the regulation is substantially related to the legitimate State interest of protecting public health and safety. Requiring a reasonable distance between sewage drainfields and the 100-year flood plain in order to allow adequate soil cleansing of the sewage prevents the public from the endangerment of sewage contaminants. The testimony supported a conclusion that 100 feet was a reasonable distance. In the event of a 100-year flood this regulation helps make certain the river will still be adequately protected from septic systems that comply with these regulations. It is appellant who has failed to show that some distance less than 100 feet would be just as effective in cleansing the sewage. The facts here as applied to the standard to be met indicate a clear substantial relation to the interest of preventing water contamination.

(Pet. App. A., p. 27.)

Finally, in commenting on the minimal impact of the setback regulation on petitioner, the Court held:

> The evidence indicates appellant is still able to utilize the property for the purposes originally intended, that of building [a] home in which to retire, although not as near the river as appellant would have liked. The evidence also reveals the fact that other options are available to appellant. A mounded septic system could be constructed which would allow the appellant more discretion in a building site.
>
> . . .
>
> We hold that the public interest involved here outweighs the encroachment upon appellant's property. As was stated in *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322, 325:
>
> > Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.

(Pet. App. A., pp. 29-30.)

SUMMARY OF ARGUMENT

The petitioner has misstated the two most determinative facts. Whereas, the petitioner contends she has been prevented from building a home on her land (Petition,

pp. 8-9), the record below clearly indicates that the petitioner may, at any time, build her home on her property. As established at trial, the denial of the petitioner's application for a sewage system permit was caused solely by the error of her civil engineer in submitting a faulty application. Secondly, the petitioner, in an attempt to wish away the undisputed scientific basis of the setback regulation, fails to inform the Court of the many studies and experts presented at trial which demonstrate that Flathead County's sewage drain field setback regulation does substantially advance the County's legitimate interest of protecting the health and safety of its citizenry.

The trial court's finding that the setback regulation "will meet" the objectives of the County in protecting the public is a finding which meets or exceeds this Court's "substantially advance" test enunciated in *Agins v. Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980).

This Court should not grant a writ of certiorari pursuant to Rule 10(c), Rev. Rules, S. Ct., because the Montana Supreme Court has not decided a federal question in a way that conflicts with applicable decisions of this Court. The Montana Supreme Court's decision paid full recognition of this Court's takings precedent, and explicitly found that its decision was in accord with U.S. Supreme Court precedent.

Due to the mistake of the petitioner's civil engineer, there was neither a "meaningful application" nor a "final decision" regarding the petitioner's sewage drain field permit. Therefore, this Court may determine that petitioner's claim is not ripe for adjudication.

Finally, the petitioner's arguments disregard the conduct from which she is prohibited. Petitioner seeks to dispose of her sewage in a way which would, in the opinion of the trial court, create a "clear and present danger" to the community. This case, therefore, is controlled by the narrow line of nuisance cases, which mandate that no taking has occurred.

ARGUMENT

I. The Montana Courts' Holding Exceeds The Requirements Of The Takings Tests Established By This Court.

Contrary to the petitioner's assertion, the 100-foot setback regulation does substantially advance the County's legitimate goal of keeping sewage out of the Flathead River. The trial court found the regulation did more than merely advance the County's goal:

> [T]here can be no question that the regulations as adopted will meet those public health standards. . . .

(Pet. App. B.1. at 19, p. 48.)

The reason for the lower court's certainty is that the harm to be prevented, *i.e.*, sewage from a drain field placed too close to the floodplain, was the exact activity which was restricted. Extensive expert testimony established the need to set back sewage drain fields from flood-prone areas. This setback guarantees that the sewage effluent will be treated in the soil and that the sewage will stay out of the river during a flood. The legislature

selected a 100-foot setback, because studies showed 100 feet to be an average distance of travel for some components of sewage effluent such as viruses. Therefore, the trial court found the nexus between the County's interest in protecting against sewage contaminants and the regulation to be well matched. If anything, the trial court's finding exceeded the tests enunciated by this Court in its takings decisions.

This Court examined the required nexus between a regulation's purpose and function in *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987). In *Nollan*, Justice Scalia, writing for the majority, said:

> [O]ur cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the State interest satisfies the requirement that the former "substantially advance" the latter.

Nollan, 107 S.Ct. at 3146-47. Then, because a permanent physical occupation of land was required, Justice Scalia closely examined whether the terms of the condition fit the California Coastal Commission's purpose in requiring the condition. *Id.* at 3148.

Here, there is no required conveyance or physical invasion; nevertheless, if scrutinized under the *Nollan* nexus test, the regulation in question does fit with its legitimate purpose. The setback regulation prevents the petitioner from dumping her sewage too close to the river. A setback rule, quite likely, is the only way to accomplish this task. Therefore, it is submitted that certiorari, if granted, would not place before the Court a

state court decision which fails to follow this Court's precedent; but rather, would show that the decision of the Montana Supreme Court exceeded the requirements established by this court.

II. Certiorari Should Not Be Granted Because The Montana Courts Have Not Decided A Federal Question In Conflict With This Court's Precedent.

Rule 10(c), Rev. Rules, S. Ct., indicates the character of reasons that will be considered in a review of a petition for writ of certiorari. This rule states, in relevant part that certiorari may be granted:

> When a state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court.

Here, the petitioner cannot show a conflict between this Court's precedent and the lower court decisions. At best, petitioner establishes that the trial court applied a higher standard than required. The petitioner points to a semantical difference rather than the substance of the case. Full analysis reveals that the Montana courts not only followed the established tests, but exceeded those tests.

III. The Petitioner Exaggerates The Impact Of The Setback Regulation.

The petitioner portrays the impact caused by the regulation as much more dramatic than what she actually suffered. Petitioner states that:

> As found by the trial court, the setback regulations adopted by the County constitute a substantial servitude on Mrs. McElwain's land, preventing her from making use of the land as a site for her home.

(Petition, pp. 8-9.)

The trial court made no such finding. The record clearly reveals that the trial court and the Montana Supreme Court found the petitioner may still build on her property:

> The evidence indicates [petitioner] is still able to utilize the property for the purposes originally intended, that of building [a] home in which to retire, although not as near the river as [petitioner] would have liked.

(Pet. App. A., p. 29.)

Whereas the petitioner attempts to lure the Court to consider this case as a total taking of her property, in truth, the petitioner may build her home with a sewage drain field at any time.

Testimony at trial revealed that petitioner's civil engineer improperly submitted the septic system drain field plans. It was held that if the petitioner's civil engineer had not made this mistake, her original application would have been accepted, and she would have been allowed to build her home without need of a variance. (Pet. App. B.1. at 12, p. 43.)

IV. Petitioner's Case May Not Be Ripe For Adjudication By This Court.

The discovery, at trial, that the petitioner may build her home without need of variance, raises a question of the ripeness of this suit. In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985), this Court set forth a two-part test to determine the ripeness of a taking dispute. Specifically, this Court required the petitioner to establish that a "final decision" had been made by the relevant legislative body. Here, with the revelation at trial that the petitioner's permit application would have been accepted, if properly submitted, the petitioner cannot meet the first prong of the *Williamson County* test. Furthermore, it is doubtful whether the petitioner can establish that she has presented a "meaningful" application as required by *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352, n. 8, 91 L.Ed.2d 285, 106 S.Ct. 2561, 2566 (1986).

A ripeness challenge goes directly to this Court's subject matter jurisdiction under the case or controversy clause of Article III of the Federal Constitution. See, *Unity Ventures v. County of Lake*, 841 F.2d 770, 774 (7th Cir.), *cert. denied*, 488 U.S. 891, 109 S.Ct. 226 (1988).

Since ripeness is jurisdictional, it may possibly be raised, *sua sponte*, in the appeal of this case. See, *e.g.*, *Hammond v. Baldwin*, 866 F.2d 172 (6th Cir. 1989). Such a result would, again, prevent the Court from rendering a final opinion. Respondent points out this flaw in the petitioner's case pursuant to the requirements of Rule 15.1, Rev. Rules, S. Ct.

V. Flathead County Is Entitled To Prevent The Petitioner From Creating A Nuisance.

The petitioner also glosses over the fact that, as found by the lower court, the prohibited conduct is a nuisance:

> [I]t is clear that the activity prohibited, i.e., a septic system within, or within 100 feet of, the 100-year floodplain is an activity which, if allowed, would be injurious to the health or safety of the community. . . . There can be no question that if the [sewage drain field] contents enter a public waterway such as the Flathead River, in this instance, that there would be a clear and present danger to those using that waterway.

(Pet. App. B.2., pp. 55-56.)

This Court has often addressed the need to allow legislative bodies to enact regulations to prohibit activities akin to nuisances. The preclusion of nuisances has not been found to be a compensable event. *Northwestern Laundry v. City of Des Moines*, 239 U.S. 486, 491-492, 60 L.Ed. 396, 36 S.Ct. 206 (1916). This Court, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L.Ed. 472, 107 S.Ct. 1232 (1987), pointed out that "a state need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance." *Id.* 480 U.S. at 492, n. 22, 107 S.Ct. at 1246, n. 22.

In dissenting from the majority opinion in *Keystone*, Chief Justice Rehnquist, joined by Justices Powell, O'Connor, and Scalia, reaffirmed the nuisance exception:

> [W]e have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use. (Citations omitted.)

Keystone, 480 U.S. at 511 (Rehnquist, C. J., dissenting).

However, Chief Justice Rehnquist described the nuisance exception as a "narrow exception allowing the government to prevent 'a misuse or illegal use.' [Citations omitted.] It is not intended to allow 'the prevention of a legal and essential use, an attribute of its ownership.' " *Id.* at 512 (Rehnquist, C. J., dissenting).

The *Keystone* dissent set forth two "narrowing principles" to the nuisance exception:

> First, nuisance regulations exempted from the Fifth Amendment have rested on discrete and narrow purposes. . . .
>
> Second, and more significantly, our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation.

Id. at 513 (Rehnquist, C. J., dissenting).

The nuisance cases, no matter how narrowly construed, apply here. In the present case, Flathead County used its police power to prevent a landowner from dispensing her sewage in a way which injures others.

Dumping sewage is a particular activity that, if not done properly, is illegal. The regulation is drafted in very narrow terms to achieve the particular purpose of protecting the floodplain zone along the Flathead River. Most significantly, the impact is minimal. The petitioner may still build her home with a septic system on her property. Therefore, the nuisance exception applies, and no taking is established.

> As pointed out in the *Keystone* dissent:
>
> [T]he Fifth Amendment . . . is designed to prevent "the public from loading upon one individual more than his just share of the burdens of government." . . .

Id. at 512 (Rehnquist, C. J., dissenting); see also, *Connolly v. Pension Benefit Guar. Corp.*, 106 S.Ct. 1018, 1027, 89 L.Ed.2d 166, 475 U.S. 211 (1986) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed.2d 1554, 80 S.Ct.1563 (1960). Here, the 100-foot setback regulation is not for the benefit of adjoining land, public use, or to enhance the County's resource position. The 100-foot setback regulation was enacted to prevent property owners in flood-prone areas from dumping their own sewage effluent in a way that hurts others. Flathead County does not gain a public use; rather, it restricts the petitioner from dumping her sewage in order to protect the public. As to petitioner McElwain's sewage, there is no one else in Flathead County who can share in her burden of properly dispensing it.

Justice Scalia reaffirms that it might be an improper end of regulation to single out a given landowner to bear a greater regulatory burden than the regulatory problem

caused by that landowner. *Nollan*, 107 S.Ct. at 3147, n. 4. Here, the landowner is only being asked to bear the burden caused by her own sewage.

VI. The County's Interest In Preventing This Nuisance Outweighs The Petitioner's Right To Build Closer To The River.

This Court has rejected the two extreme positions in takings law. As a result, government cannot regulate every attribute of land, nor can the landowner treat her land in ways repugnant to a modern society. Therefore, in *Keystone*, this Court indicated that takings analysis "necessarily requires a weighing of private and public interests." *Keystone*, 480 U.S. at 492. If this Court applies a balancing test to the facts established in the record, Flathead County should prevail. The petitioner's interest in building 100 feet closer to or within the floodplain is minimal. The petitioner not only jeopardizes others with her raw sewage, but she also subjects her own home to flooding and sewage backup during a flood. The petitioner's right to maintain this nuisance does not outweigh the County's desire to protect the public from sewage. The setback regulation represents an effort on behalf of Flathead County to prevent raw sewage from finding its way into the Flathead River. The petitioner's sewage endangers the public health, welfare, and safety. Raw sewage is a nuisance which cannot be tolerated in this modern era. The petitioner wants to build a house closer to the river. A balancing test applied to these circumstances clearly establishes that the County's interest is greater than the petitioner's. Therefore, the

County's 100-foot setback regulation should be upheld, and the petition for writ of certiorari denied.

CONCLUSION

For the reasons presented above, the petition for writ of certiorari should be denied.

Respectfully submitted,

Thomas J. Murphy
#9 3rd St. N., Suite 203
P. O. Box 2049
Great Falls, MT 59403
(406) 727-9270

Attorney of Record
for Respondent

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